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In The

Supreme Court of the United States

October Term, 1982

PEOPLE FOR FREE SPEECH AT SAC,
ANNE ELSE,

Petitioners,

vs.

UNITED STATES AIR FORCE,
COL. JOHN R. McKONE,
MAJ. GARY TROUT,
In their official capacities,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the United States Air Force has opened certain portions of an otherwise closed Air Force base to the general public to "show the community the relationship between national objectives and the missions of various Offutt organizations" and invited several non-military speakers to communicate messages not directly related to the purpose of the open house, may the Air Force exclude petitioners' message based on its content or viewpoint?

2. Has the Air Force created a temporary public forum in the opened portions of the base so that only a compelling governmental interest, not present here, could justify exclusion of petitioners' message?

3. Has the Air Force violated petitioners' right to procedural due process by its selective enforcement of AFR 190-5?

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The petitioners, People for Free Speech at SAC* and Anne Else respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States

*People for Free Speech at SAC was incorrectly referred to during the expedited appeals as Persons for Free Speech at SAC. This accounts for the different name on the opinion of the Court of Appeal.

Court of Appeals for the Eighth Circuit entered in this proceeding on April 28, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 675 F. 2d 1010 and appears in the Appendix A hereto. The opinion of the United States District Court is unreported and appears in the Appendix B hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on April 28, 1982. A timely motion for extension of time within which to file a petition for certiorari was sustained, giving petitioners until August 27, 1982 to file the petition. This Court's jurisdiction is invoked under Title 28, U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Where the United States Air Force has opened certain portions of an otherwise closed Air Force base to the general public to "show the community the relationship between national objectives and the missions of various Offutt organizations" and invited several non-

military speakers to communicate messages not directly related to the purpose of the open house, may the Air Force exclude petitioners' message based on its content or viewpoint?

2. Has the Air Force created a temporary public forum in the opened portions of the base so that only a compelling governmental interest, not present here, could justify exclusion of petitioners' message?

3. Has the Air Force violated petitioners' right to procedural due process by its selective enforcement of AFR 190-5?

STATUTORY PROVISIONS INVOLVED

AFR 190-5(3)(d) and (e) which appear as Appendix C hereto.

STATEMENT OF THE CASE

Jurisdiction in the district court was based on Title 28, U. S. C. § 1331 due to the presence of a federal question. Relief was sought in the nature of a declaratory judgment under Title 28, U. S. C. § 2201 and for injunctive relief under Title 28, U. S. C. § 1361.

Petitioners sought permission to participate in the June 14, 1981 Offutt Air Force Base open house by letter (Exhibit 22) addressed to the base commander. Colonel

McKone, also by letter (Exhibit 23) denied the request, stating that petitioners' "proposed activities would not be in keeping with the purpose of the Open House program." A hearing on June 12, 1981 was held by the United States District Court for the District of Nebraska, Judge Schatz holding for respondents. On June 13, 1981, an expedited appeal was heard before Chief Judge Donald Lay of the Court of Appeals. After a telephonically convened three-judge panel, the Court of Appeals refused to grant injunctive relief. Justice Blackmun declined to enter an injunction on June 14, 1981. The case was remanded to the district court for further proceedings. Petitioners filed an amended complaint, respondents answered, and a further trial was had on August 3, 1981. On September 1, 1981, the district court granted judgment to respondents and filed a memorandum opinion. Petitioners appealed. On November 9, 1981, the Eighth Circuit heard the appeal en banc. The Court of Appeals, per Judge Ross, affirmed the judgment of the district court on April 28, 1982.

The petitioners sought to participate at the Offutt Air Force Base open house held on June 14, 1981. Petitioners also seek to participate in open house programs in the future. Petitioners agreed to comply with any reasonable time, place, or manner requirements. Petitioners offered to let the Air Force screen their literature. The Air Force refused. Petitioners sought a booth. They were denied one. Petitioners sought to wear messages on their clothing. With one exception, such clothing was excluded from the base during the open house.

The open house is an annual program where Offutt, an otherwise closed base, opens certain areas of the base to the general public. 1981 was the sixth such open house. 129,000 civilians attended. As many as 250,000 visitors could be accommodated at the open house. The Air Force diverted personnel, facilities, and equipment from the regular mission to put on this public relations event. There were aircraft displays, drill teams, static displays, the SAC band, booths for recruiters of all branches of the military, and booths for non-military invitees. The non-military invitees were permitted to distribute literature only after it was censored by Major Trout (Vol. I, 35:18-21). The non-military invitees included defense contractors, a model airplane club, Operation Bridge (a local drug awareness group), a black awareness group, the Bellevue Chamber of Commerce, and Big Brothers-Big Sisters. Petitioners sought to be treated in the same manner as the other non-military invitees.

On the day of the open house, members of People for Free Speech at SAC assembled lawfully at the gates into Offutt. Several held a banner, while others held placards. John Hutchens tried to enter the base wearing a "U.S.C." T-shirt with a small sign taped to the back. The sign explained that John would be praying and why he would be praying (Vol. II, 54:8-12). He was denied entry until the sign was removed (Vol. II, 54:15-24). John was stopped when he tried to leave the base (Vol. II, 56:1-5). He was told that he could not reenter the opened base because he was associated with the people engaged in a lawful off-base demonstration (Vol. II, 56:16 to 57:6). Several other members of petitioner were likewise prevented from entering because of their clothing messages

or button messages. The chief of base security instructed the guards at the gates not to admit civilians if they had signs, buttons, or clothing that was "political" or "ideological" in nature. The guards were not given a definition of these terms, only told to make judgment calls (Vol. II, 14:20 to 15:7, Vol. II, 16:13-18).

During the open house, eight members of petitioner attended a regularly scheduled Catholic mass at the base chapel. These eight people were not disruptive in any way. After the mass, they were "detained," fingerprinted, photographed, issued ban and bar letters, and expelled from the base. At the time the eight entered the chapel, it was within the opened area of the base and not marked closed to the public. These eight people were identifiably associated with the petitioner. There does not appear to be any other reason why they were kicked off the base.

The Air Force communicated a message to the civilian audience created by the open house. The non-military invitees communicated a message to the same audience. Petitioners' message was excluded because the base commander decided that petitioners' "proposed activities would not be in keeping with the purpose of the Open House program." (Exhibit 23).

REASONS FOR GRANTING THE WRIT

1. The United States Air Force has been permitted to disregard the First Amendment precept of governmental content neutrality in the marketplace of ideas.

The open house was designed by the Air Force to convey a positive image to the community. The Court

of Appeals acknowledged that the Air Force was speaking at the open house. This pro-nuclear weaponry, pro-Air Force pitch was directed at the 129,000 civilians who came to the open house. Several other speakers were permitted to convey messages during the open house, although none was required to address the same topic which the Air Force espoused. The Air Force excluded petitioners' response to several of these messages.

The Air Force made no effort to distinguish the political or ideological character of its speech from the political or ideological character of petitioners' reply. The Court of Appeals simply held that the Air Force can create a platform from which it may seek public approbation and, while inviting an assortment of speakers to address the same audience, can exclude petitioners based on the content of their speech.

The Air Force amply demonstrated that hostility to petitioners' viewpoint was the motivation for petitioners' exclusion. Petitioners offered to submit their literature to the base commander for review prior to the open house. (Petitioners' Complaint, § 22, admitted by defendants' Answer, § 10.) The base commander refused to even review the material. There is no suggestion that the literature posed any danger to the mission, loyalty or discipline at Offutt Air Force Base. The Air Force maintained a sign, button, and clothing barrier at the entrances to the base. The sentries were instructed that no "political" or "ideological" messages were to be allowed in. At least one member of petitioner was told that he could not reenter the base because he was associated with a lawful off-base demonstration. And eight members of petitioner were

expelled for celebrating a regularly scheduled Catholic mass at the base chapel.

The Air Force made plain its willingness to admit speakers whose views it liked. As the dissent noted:

> The defense contractors have a vital interest in promoting public support for defense policies which emphasize high technology products and weapons systems. Moreover, public confidence in the weapon products is crucial to sustaining the policies which lead to such products. In promoting their current products to the general public at the open house, the contractors are unmistakably promoting public support, for the defense policies on which those products depend. *Persons for Free Speech at Sac*, at 1024.

The Air Force invited 129,000 civilians to listen to its public relations pitch. It invited defense contractors and others to speak. The Air Force excluded petitioners' reply based on the petitioners' disfavored viewpoint concerning the topic being discussed. This content discrimination plainly violates the First Amendment.

This Court has repeatedly held that government "may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views." *Police Department of Chicago v. Mosley*, 408 U. S. 92, 96 (1972); *United States Postal Service v. Greenburgh Civic Association*, 453 U. S. 114 (1981).

The Air Force has been permitted to dominate the marketplace of ideas which it created by opening the base to the public. This manifestly distorts the search for truth and prevents the citizenry from making informed choices about the topics discussed at the open house.

The content based discrimination practiced by the Air Force was not authorized by AFR 190-5. AFR 190-5 is both overbroad and routinely ignored by the Air Force. The regulation excludes groups (such as the Bellevue Chamber of Commerce and Operation Bridge), commercial ventures (such as Boeing, McDonnell-Douglas, and General Electric) and practically everyone else. The regulation does not exclude only ideological, religious or political groups. The regulation is overbroad because it is not limited to activities which affect loyalty, discipline, or good order. It is not limited to activities which may affect the mission. The Army regulation upheld in *Greer v. Spock*, 424 U.S. 828 (1976) did not permit a base commander to disapprove of speech activities unless he found "a clear danger to [military] loyalty, discipline, or morale." Twice since *Spock*, this Court has looked to the impact of the proposed speech on the mission and military discipline before upholding military regulations. *Brown v. Glines*, 444 U.S. 348 (1980); *Secretary of the Navy v. Huff*, 444 U.S. 453 (1980).

The Court of Appeals did not reach the validity of AFR 190-5. Nevertheless, it did rely on the regulation to support its argument that the base commander's content discrimination was constitutional.

The Air Force has been permitted to disregard the precept of content neutrality in government control over the marketplace of ideas. The distinction drawn by the Air Force is not related to the mission of the base, nor to any need to maintain the loyalty, good order, or discipline of the military personnel. Indeed, the only ap-

parent basis for petitioners' exclusion is the base commander's hostility to petitioners' viewpoint.

2. The Court of Appeals' public forum test differs in principle from that applied by other circuits.

The Court of Appeals determined that Offutt Air Force Base was not a public forum during the open house in the portions of the base open to the public. The majority reached this conclusion by reviewing "the historical and traditional uses of the relevant government property," *Persons for Free Speech at SAC*, at 1015, then deciding that the open house was not such "a deviation" from those uses as to create a public forum. The dissent reached a contrary result by applying the incompatibility test taken from *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) ("The crucial question is whether the [proposed] manner of expression is basically incompatible with the normal activity of a particular place at a particular time.")

Several other courts of appeal have adopted the incompatibility test. *Grace v. Burger*, 665 F. 2d 1193, 1202 (D.C. Cir. 1981) prob. jur. noted 50 U.S.L.W. 3998.01 (1982) (Supreme Court grounds); *Dallas Association, etc. v. Dallas Cty. Hospital Dist.*, 656 F. 2d 1175 modified 670 F. 2d 629, 631 (5th Cir. 1982) (county hospital lobbies and waiting areas); *Bonner-Lyons v. School Committee of the City of Boston*, 480 F. 2d 442 (1st Cir. 1973) (material sent home with pupils addressed to the parents); *Wolin v. Port Authority of New York*, 392 F. 2d 83, 89 (2nd Cir. 1968) (bus terminal); *National Socialist White*

People's Party v. Ringers, 473 F. 2d 1010 (4th Cir. 1973) (school auditorium).

The dissent accepted the incompatibility test. Under that test, petitioners have shown that the open house was a temporary public forum. Simply because the public is freely admitted to a government facility does not mean the facility becomes a public forum. *Greer v. Spock*, 424 U.S. 828, 836 (1976). However, free public access is a significant factor to consider when determining if a particular government property is or can become a public forum. Here the Air Force invited the general public onto an otherwise closed military base for public relations purposes. Even people with prior "ban and bar" letters were admitted (Vol. II, 11:16-22). Nearly 130,000 people accepted the invitation.

It is also true that "merely because speech activities occur at a particular place does not automatically convert a government facility into a public forum." *U.S. Postal Service, supra*, at 130 n. 6. However the propaganda of the Air Force and some of its invitees contrasts sharply with the government silence and complete content neutrality upheld in *U.S. Postal Service.*

In *Greer v. Spock*, 424 U.S. 828 (1976), this Court rejected an attempt to create a political platform out of the Fort Dix basic training base. Spock wished to campaign among the basic trainees. The base commander did not want to disrupt his mission of training soldiers to accommodate Spock. Here the Air Force has already converted the base into a platform from which it may speak to the civilian audience. The Air Force gave non-military speakers access to the same forum. The base

commander has accommodated his primary mission of defending the United States to the presence of 129,000 visitors on certain portions of the base. Petitioners did not seek to speak with the military personnel at the base. Petitioners sought to address the civilian guests. Petitioners sought to talk about the same issue addressed by the Air Force and some of the other speakers. Further, no one has ever contended that petitioners' literature posed any threat to the good order, loyalty, or discipline of the military personnel or to the mission of the base.

The Court of Appeals found no public forum, in part, because the message conveyed by the Air Force was not its own. Rather, the ideological message reflects an "ideology which is developed and controlled under our Constitution by civilians." *Persons for Free Speech at SAC, supra,* at 1017. By adopting a military base at which to peddle its ideological wares, the government has created a public forum where it must risk that some listeners may not agree with the Air Force's message.

The Air Force created a temporary public forum during the open house for those portions of the base open to the public. The Court of Appeals' public forum test is inconsistent in principle with the test used by the other circuits.

3. AFR 190-5 violates procedural due process.

The Air Force has sought to rely on AFR 190-5, at least in part, to sustain its actions below. The regulation violates procedural due process. In *Southeastern Promotions Ltd. v. Conrad,* 420 U.S. 546 (1975), this Court reversed a municipal decision to deny Southeastern the use of a municipal theatre for a showing of the rock

musical "Hair." This Court held that prior restraints bear a heavy presumption of unconstitutionality. The censor bears the burden of disproving this presumption. *Buckley v. Valeo*, 424 U.S. 1 (1976). The censor must initiate review procedures. The restraint can only be for a short period of time in order to preserve the status quo. Finally, a prior restraint will be held invalid where there is no prompt judicial review of any final action. AFR 190-5 provides none of these procedural protections. It operates as a prior restraint on petitioners' First Amendment activities to the extent that the base commander seeks to rely upon it in denying petitioners' access to the open house.

Petitioners repeatedly offered to comply with any reasonable time, place, manner restrictions imposed on the other non-military invitees. Instead, the Air Force and respondents McKone and Trout excluded petitioners from any participation in the open house. This exclusion violates petitioners' right to due process of law.

4. The Court of Appeals was sharply divided on these important questions of law.

The Court of Appeals heard this case *en banc*. The Court split 5-3. The division concerned fundamental questions of law, rather than disputes on factual matters. The majority applied a historical test to determine the nonexistence of a public forum. The dissenters applied an incompatibility test, used by several other courts of appeal. The dissenters found the open house to be a public forum. The majority held, in effect, that a military base commander need not act in a content neutral manner in excluding speakers from an open house. The dis-

senters argued that content neutrality is an independent principle of First Amendment law, violated by the Air Force in this case.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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